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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 218

THE PEOPLE OF THE STATE OF NEW YORK EX REL. C. HANDASYDE WHITNEY,

Appellant,

vs.

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

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SUPREME COURT OF THE UNITED STATES

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THE PEOPLE OF THE STATE OF NEW YORK EX REL. C. HANDASYDE WHITNEY,

Relator,

vs.

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK,

Defendants.

STATEMENT AS TO JURISDICTION ON APPEAL.

Pursuant to Rule 12 this statement disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review on appeal the orders and decisions of the New York courts is filed.

I.

Statutory Provision Sustaining Jurisdiction.

Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 299, 43 Stat. 936, 937 (U. S. C. A., Tit. 28, § 344 (a)), provides as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, where * * *; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error * * *."

Pursuant to the Act of January 31, 1928 (45 Stat. 54; U. S. C. A., Tit. 28, § 861 (a)), as amended by Act of April 26, 1928 (45 Stat. 466; U. S. C. A., Tit. 28, § 861 (b)), the present appeal is brought in lieu of a writ of error.

II.

New York Statute of Which the Validity is Involved.

Under Sections 351 and 351-a of the Tax Law of New York an income tax was levied against the appellant, who never lived or carried on business in New York, upon profit derived by him in 1929 from the sale of a fractional membership in the New York Stock Exchange.

The Sections 351 and 351-a, material provisions of which are quoted below are part of Article 16 of the New York Tax Law, Chapter 60 of the Consolidated Laws of New York, and may be found in Book 59 of McKinney's Consol. Laws of New York Annotated, at pages 643 and 644 or in Cahill's Consol. Laws of New York, 2d Edition (1930), Chapter 61, pages 2388 and 9.

SECTION 351: "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: * * * A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried

on in this state by natural persons not residents of the state * * *"

SECTION 351-a. "The tax provided for in section three hundred and fifty-one of this chapter, upon and with respect to income derived from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state, is hereby reimposed with respect to the taxable income for the calendar year nineteen hundred and nineteen and for any taxable year ending during the year nineteen hundred and nineteen, and for each year thereafter * * *"

III.

Dates of Judgment and of Presentation of Application for Appeal.

The order and judgment sought to be reviewed was entered June 1, 1936 (R. 90), in the Supreme Court of the State of New York for Albany County upon a remittitur from the Court of Appeals of said state handed down May 20, 1936 as amended by order of May 26, 1936 (R. 86).

The petition for appeal is to be presented this 16th day of June 1936.

IV.

Opinions Below.

No opinion was filed either by the Supreme Court, Appellate Division or by the Court of Appeals, but a short decision by the Appellate Division appears at folios 242 to 246 of the record, pages 81 and 82, and the remittitur of the Court of Appeals with amendment appears at pages 86 to 89 of the record.

V.

Nature of the Case and Jurisdiction Upon Appeal.

The tax levied against the Appellant, a resident of Massachusetts who never had a domicile in or carried on business in New York, was assessed against him on the ground that in 1929 he had income "from property owned" in New York.* The Respondent Tax Commissioners have never before or since the tax here involved endeavored to impose an income tax on the business of the petitioner or his firm. They do not attempt to sustain the instant tax under the second clause of the taxing language as a tax upon the appellant's income from a business "carried on in this state." Obviously the appellant's firm, Whitney & Elwell, were not carrying on a business in New York by any definition.

Bank of America v. *Whitney Bank*, 261 U. S. 271;
Hovey v. *DeLong Hook & Eye Co.*, 211 N. Y. 420;
Art. 415 of the Regulations of the New York State Tax Commission contained in Manual 32 issued by said Commission.

Statement of Facts.

The New York Stock Exchange is an unincorporated association organized in 1799 holding the beneficial ownership of the stock of the corporation owning the land and building in New York City where business on the Exchange is transacted. It is supported by dues and charges made against and paid by its members. Membership is evidenced by a certificate in the form of a letter signed by the secretary of the Exchange. It can be transferred only with approval of the Exchange (fols. 134-5, 157-8, 161).

In 1929 the Exchange increased its membership 25% by issuing in the nature of a stock dividend to each of its then members a so-called "right" representing one-quarter

interest in a new membership. The appellant, a member of the Exchange and of the Boston firm of Whitney & Elwell since 1909, sold such right for $108,000. The tax is question was upon the difference between this and one-fifth of the price originally paid for the membership plus capital additions (fols. 133, 139, 144, 160).

The appellant has always been domiciled in Massachusetts. He and his firm have been in the securities business in Boston since the date of acquisition of his membership, with their only office there. Neither the firm nor any of its members has ever had an office, domicile, or abode in New York nor did they ever carry on business there. They did not buy and sell securities on the Exchange for their firm account (fols. 137 to 142, 175).

The firm's business consisted almost entirely of commission orders from customers received at its Boston office for the purchase and sale of securities listed on the New York Stock Exchange. None of this was conducted by the appellant or members of his firm on the floor of the exchange or in New York State; orders requiring execution on the Exchange were all given to independent firms, members of the Exchange who had business offices in New York and who executed and completed the orders on the Exchange in their own names as principals (fols. 145-7, 177). These independent New York firms acted as correspondents for the appellant's firm lending money on the security of the stocks purchased and other collateral delivered to them.

The Exchange rules prescribe a minimum commission which must be charged by all members for the execution of orders for non-members. By reason of the appellant's membership in the Exchange his firm is able to have their New York correspondents execute orders at forty per cent of the commission fixed for non-members. Whitney & Elwell charges its customers the fixed minimum commission

which the customer would have to pay any Stock Exchange house through whom he did business and pays forty per cent of that commission to the New York correspondent who actually executed the order in New York, retaining the other sixty per cent as its compensation. This division of the commission was fixed by mutual agreement between Whitney & Elwell and the New York firms which actually did the business (fols. 152-156, 182, 183, 187, 189, 201, 202).

The appellant's profit on the sale of his "right" was required to be reported as taxable income at his domicile in Massachusetts, although deductions for other losses resulted in no Massachusetts tax being actually paid (fols. 90, 91).

How the Federal Question was Raised and Decided.

By claims for refund filed when he paid the taxes under protest the appellant raised the question as to the validity of the tax under the Federal Constitution (fols. 113, 114, 125, 126).

By his petition under Sec. 375 of the New York State Tax Law, for writ of certiorari to review the determination of the respondents affirming the tax the question of New York's jurisdiction under the Federal Constitution to levy this tax was raised before the court (fol. 33).

The decision of the Appellate Division of the Supreme Court of New York affirming the determination of the respondents stated the question as "whether the State of New York has jurisdiction to tax as income profits derived by a non-resident from the sale of an interest in a membership on the New York Stock Exchange," and that the tax was imposed as a tax upon "income upon property within the State of New York" (fol. 243).

The Court of Appeals affirmed the tax against the appellant's contention "that the assessment * * * contravenes the Fourteenth amendment of the Federal Constitu-

tion as an extraterritorial tax, and such question was presented and necessarily passed upon but not sustained by the court'' (Amended Remittitur of the Court of Appeals at R. 89).

The Supreme Court of New York for Albany County in pursuance of this remittitur entered final judgment against the appellant (R. 90). This constitutes the final decision of the highest court of the State in which a decision could be had so that the appeal is taken directly from that order and judgment. The amendment to the remittitur showing the Federal question necessarily passed upon is in accordance with the suggestion made in this Court's opinion in *Lynch* v. *New York*, 293 U. S. 52, 55.

Therefore, in this case the validity of a state statute (Secs. 351 and 351 A of the New York Tax Law) was clearly and seasonably drawn in question on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity, the highest court of the state in which a decision could be had having passed upon the question and decided it against the Appellant.

First National Bank v. *Maine*, 284 U. S. 312;
Hoeper v. *Tax Comm. of Wisconsin*, 284 U. S. 206;
Mayflower Farms, Inc., v. *Ten Eyck*, 297 U. S. 266;
Atlantic Lumber Co. v. *Comm. of Corporations and Taxation*, 297 U. S. —, 80 L. Ed. 908,

are all cases where similar if not identical procedure has been followed. All of them support the assumption of appellate jurisdiction by this Court in cases where was raised the same type of question as is presented on this appeal.

The dismissal of appeals in *People ex rel. Blagden* v. *Lynch* and *People ex rel. Sackett* v. *Lynch*, 291 U. S. 652, 292 U. S. 602, 608, are not authority in the case at bar because the pleadings, particularly the remittitur of the Court

of Appeals, did not show that a Federal question had necessarily been decided by the New York courts, and for the further reason, set forth more fully below, that the appellants in those cases carried on business in New York.

The Substantial Nature of the Federal Question.

(a) *Unless a "Business Situs" Existed in New York the Tax Against the Appellant was Invalid.*

A New York Stock Exchange membership has been determined by this Court to be intangible personalty, subject to local property taxation at the Ohio domicile of the owner and not so bound up with the physical location of the Exchange as to be like real property, subject to personal property tax only in New York. Thus, it has been authoritatively decided by this Court that a New York Stock Exchange membership is property owned at the owner's domicile in Ohio, not in New York.

Citizens National Bank v. *Durr*, 257 U. S. 99*.

Recent decisions of this Court have prevented taxation of intangibles owned by non-resident decedents even though the intangibles were creatures of or located in the state seeking to tax.

Farmers Loan & Trust Co. v. *Minn.*, 280 U. S. 204, involving registered obligations of the state or its municipalities physically located there.

Baldwin v. *Missouri*, 281 U. S. 586, involving cash in banks, bonds and notes secured by local mortgages all kept in the state attempting to tax but owned by a non-resident decedent.

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* Note that if the membership had been held to be an incorporeal hereditament it would have had a taxable situs and been owned *only* in New York. 257 U. S. 109; *Louisville & Jeffersonville Ferry Company* v. *Kentucky*, 188 U. S. 385.

First National Bank v. *Maine*, 284 U. S. 312, *supra*, involving shares in a Maine corporation owned by a Massachusetts decedent.

These decisions which specifically overrule at least one earlier case * rest upon the theory that two states cannot tax the same thing on "different or inconsistent principles" and that the only state in which intangibles are for purposes of taxation is the state of the owner's domicile, where by force of the maxim *mobilia sequuntur personam* the intangible property has its situs.

First National Bank v. *Maine*, 284 U. S. 312, *supra*, at 326, 329.

If these decisions mean what they say the situs of the appellant's Exchange membership was in Massachusetts. Being an intangible it was property owned at its situs at its owner's domicile and taxable there. It was not "property owned" in New York, particularly in a case such as the one at bar where the taxpayer was a complete non-resident without home or business in New York.

Barring the acquisition by the appellant's membership or "right" of a "business situs" it results from the above cases that it is beyond New York's jurisdiction under the Federal Constitution to tax profit resulting from the sale of those intangibles owned by non-residents as income from "property owned in" that state.

Shaffer v. *Carter* and *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U. S. 37 and 60, sustaining income taxes on non-residents concerned only business carried on and real or tangible property owned by non-residents in the taxing state. In *Shaffer* v. *Carter*, *supra*, at p. 57 it was stated that the jurisdiction of a state to tax non-residents "extends only to their property owned within the state and

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* *Blackstone* v. *Miller*, 188 U. S. 189.

their business, trade, or profession carried on therein." There is no decision of this Court holding valid in the absence of a "business situs" an income tax on profit resulting to non-residents from the sale of intangibles. On the contrary the recent cases relied on herein hold that intangibles can be "property owned" only at the owner's domicile. To tax intangibles or profit resulting from their sale, elsewhere than at the owner's domicile is to disregard the above discussed cases which hold, as stated in *Baldwin* v. *Missouri*, 281 U. S. 586 at 593, *supra*, that intangibles owned by a non-resident with no "business situs" in the state are not within the state for taxation purposes.

The question in the case at bar is not one of double or multiple taxation. It is a question of New York's jurisdiction to tax and its inability to tax this particular intangible property which is owned elsewhere. This inability is not cured by the provisions of the New York Tax Law allowing credit to non-residents for taxes paid to their home state.

First National Bank v. *Maine*, *supra*, where identical provisions for credit were not permitted to validate the tax.

(b) *There Was No "Business Situs" in New York.*

Profit from the sale of an exchange membership owned by a non-resident is income taxable by New York if the owner, having a business office in New York, used his membership by personally executing orders on the floor of the Exchange. *People ex rel. Blagden* v. *Lynch*, and *People ex rel. Sackett* v. *Lynch*,* 238 App. Div. 881; 263 N. Y.

* That the tax in those cases was explicitly rested on the acquisition of a "business situs" appears from the notice of assessment in the *Blagden* case (Blagden record, fol. 113) and from the hearing in the *Sackett* case (Sackett record, fol. 136).

568; appeal dismissed for want of jurisdiction and certiorari denied—291 U. S. 652; 292 U. S. 602, 608.

The memberships in those cases had acquired a "business situs" in New York because the owners personally used the memberships in their New York business on which they paid uncontested income tax to New York, in addition to the contested assessment on the membership sale profit.

"Business situs" permitting a state other than that of the domicile of the owner of an intangible to tax intangibles which have acquired such a situs is a recognized exception to the cases cited in the previous section of this statement. *First National Bank* v. *Maine, supra,* at p. 331; *Farmers Loan Co.* v. *Minn., supra,* at p. 213.

It seems a manifest contradiction to support the result in the case at bar upon a theory of "business situs" in New York when it is clear and admitted that neither the appellant nor his firm were doing a taxable business there on any conceivable theory. *Bank of America* v. *Whitney Bank,* 261 U. S. 171, *supra.*

"Business" carried on elsewhere certainly cannot give a "business situs" in New York. When used by itself and when used with "situs," the word "business" must have approximately the same meaning. None of the decided cases in this Court indicate "business situs" is established by facts such as those existing in the case at bar.

The only authoritative cases in this Court which sustain taxation of intangibles elsewhere than at the owner's domicile on the ground of a "business situs" acquired there are based on their personal use or employment in a business carried on in the second state.

New Orleans v. *Stempel,* 175 U. S. 309, where a non-resident conducted a business of loaning money on Louisiana real estate, through an agent there;

Bristol v. *Washington County,* 177 U. S. 133, an identical case except that the evidences of the credits were payable

to the non-resident owner and custody of them was not continuously kept by the local agent;

Board of Assessors v. *Comptoir National,* 191 U. S. 388, where a non-resident company carried on a local loan business through an agent who had custody of the evidences of the credits;

Scottish Union & National Insurance Company v. *Bowland,* 196 U. S. 611, where bonds deposited with the state of Ohio under its laws regulating the doing of insurance business there were held subject to property tax there.

Metropolitan Life Ins. Co. v. *New Orleans,* 205 U. S. 395, a similar case except that the notes were not continuously in the local agent's custody although they were whenever needed for the purposes of the business;

Liverpool & L. & G. Ins. Co. v. *Orleans Assessors,* 221 U. S. 346, where extensions of premium credits were granted to local policyholders as a part of the business of a company qualified to do business there;

Rogers v. *Hennepin County,* 240 U. S. 184, which sustained a property tax on memberships in a Minneapolis Exchange, in a case where the pleadings admitted personal use of the Exchange membership in business there, and where this Court stated (240 U. S. 191): "it sufficiently appears from the allegations that the memberships represented rights and privileges *which were exercised in transactions at the Exchange in the City of Minneapolis;* and, we are of the opinion, applying a principle which has had recognition with respect to credits in favor of non-residents arising from business within the State, and in the case of shares of stock of domestic corporations, that it was competent for the State to fix the *situs* of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located," citing *Tappan* v. *Merchants*

National Bank, 19 Wall. 490; *Corry* v. *Baltimore*, 196 U. S. 466, and some of the cases listed on the preceding page hereof.

In all of these cases the owner of the intangible either personally used the intangible in the State where "business situs" was established, or the evidences of the intangibles were physically present there or managed by a general agent who had general authority to deal with them. In the appellant's case there was no personal use in New York. The only representation the appellant had in New York was that of independent contractors doing business there who took and executed in their own names orders received from the appellant's firm, were paid for each item of service rendered in New York and who had no general authority to deal with the appellant's property.

In such circumstances there is no "business situs" in New York. *Newport Company* v. *Wisconsin State Tax Commission* (Wisconsin 1935), 261 N. W. 884, 297 U. S. —, 80 L. Ed. 651, in which, applying the principles of the above cases and on the ground that there was no "business situs", a state income tax assessment was held invalid against a Delaware Corporation doing business in Wisconsin for profit resulting from (1) the sale of securities and (2) the sale of patent rights developed as a by-product of research work in the company's laboratories in Wisconsin.

With particular reference to the decision of *Rogers* v. *Hennepin County*, 240 U. S. 184, *supra*, and the principle applied in accordance with the above quotation, it is important to note the following three facts which show clearly that the decision is not controlling authority in the case at bar.

1. New York has definitely not fixed the situs of memberships for the purpose of taxation at the place where the

Exchange was located. In fact New York Stock Exchange memberships are not subject to a personal property tax even to resident owners because the personal property tax law does not attempt to reach them. (*Slade* v. *Comm. of Taxes*, 53 Misc. 336, 104 N. Y. S. 756; *Lemmon* v. *Feitner*, 167 N. Y. 1, 60 N. E. 265; *Matter of Hellman*, 174 N. Y. 254, 66 N. E. 809.)

The appellant's case and the *Rogers* case therefore stand on very different bases because in the latter a local statute has determined a situs for property taxation to both residents and non-resident owners while in the former the local statute has not determined a personal property tax situs even for resident owners.

2. The appellant never used his membership personally to execute any orders, whereas Paragraph eleven of the amended bill in the Rogers case admitted such a personal use by the taxpayers there and raised no question of orders for customers such as exists in the case at bar.

3. Since the decision in the *Rogers* case this Court has ruled that two States cannot tax the same thing at the same time on inconsistent legal theories. It follows that so far as the *Rogers* case stands for the general proposition that, irrespective of statute determining situs for all concerned (like the National Banking Act provisions sustained in *Tappan* v. *Merchants Bank*, 19 Wall. 490, or the Maryland statute upheld in *Corry* v. *Baltimore*, 196 U. S. 466,) Minnesota can tax as property owned there an exchange membership owned elsewhere, it like *Blackstone* v. *Miller*, 188 U. S. 189, is limited by the decision and theories of *First National Bank* v. *Maine, supra, Farmers Loan & Trust Co.* v. *Minnesota, supra, Baldwin* v. *Missouri, supra.*

In the situation at bar the real estate and business of the Exchange are taxed in New York to the New York corporation. (Articles 1, 2, 9a and 9b of the New York State Tax Law (Chapter 60 of the Consolidated Laws of New York)). As one of the persons for whose benefit are held the shares of this corporation the appellant participates in taxation by New York. The actual business of executing orders and carrying securities on margin there is taxed to the New York correspondents of the appellant's firm who have the offices and do the business there (Art. 16, Sec. 351 of the New York Tax Law). The petitioner owned no property in New York and carried on no business there.

Unless the standards of facts which can create a "business situs" are to be tremendously relaxed from those of the decided cases, neither the appellant's membership nor his "right" had any "business situs" in New York. There is no authority for such relaxation. Nor is there any occasion so to relax them because the whole theory of taxation based upon the acquisition of a "business situs" is to see that business or property used or in a State does not escape contribution to the cost of government because of its ownership elsewhere.

Newport Company v. *Wisconsin Tax Commission* (Wisconsin 1935), 261 N. W. 884, 297 U. S. —, 80 L. ed. 651.

(c) *The Importance and Scope of the Question*

Although the amount involved in this one case is small, over $30,000 in tax is dependent upon the result here and there is no decision of this Court subsequent to the decisions of *Farmers Loan & Trust Company* v. *Minn.*, 280 U. S. 204, *supra*, and *First National Bank* v. *Maine*, 284 U. S. 312, *supra*, indicating how far the principles of those recent cases are limited, if at all, in their application to

property, income or inheritance taxation of Exchange memberships, the owners of which do not personally transact business on the Exchange. There are many exchanges or boards of trade in this country whose memberships are owned by non-residents or even aliens so that the property, income and inheritance taxation of them is one of substance and of recurring importance.

See *The Passing of Situs XLV Harv. L. Review,* 777 at 784.

(d) *The unsoundness of the Respondent's Position.*

This Court will itself inquire as to whether the facts presented were sufficient to give the intangible a "business situs."

> *Beidler* v. *So. Carolina Tax Comm.,* 282 U. S. 1, reversing the So. Carolina courts and holding that an Illinois majority stockholders' loan to a So. Carolina corporation did not have a "business situs" in So. Carolina.

The respondents endeavor to meet in three unsound ways the manifest contradiction involved in saying that the appellant' membership had a business situs in New York where tne appellant carried on no business.

First, it is urged that an Exchange membership is property *sui generis* so bound up with the locality of the exchange facilities and building that it has in addition to situs as its owner's domicile an additional or dual situs in New York, regardless of the transaction of business in that State. This is only a resurrection of the minority "doubts" in the *Durr* case and is therefore untenable.

Second, it is urged that the appellant was co-owner with the 1099 other members of the Exchange of the Exchange's

property, and hence a partner in the business of operating a stock exchange in New York. As the property in New York where the Exchange is located is owned by a New York corporation, this is the same argument which was refused by this Court in *Rhode Island Hospital Trust Company* v. *Doughton*, 270 U. S. 69, where, in holding shares of a non-resident shareholder, deceased, not taxable by North Carolina in which state was located the principal business and over sixty-six and two-thirds per cent of the assets of the corporation, this Court repudiated "the theory that the stockholder is the owner of the property of the corporation, and the state which has jurisdiction of any of the corporate property has *pro tanto* jurisdiction of his shares of stock." 270 U. S. at 81. Furthermore, the Exchange is a membership and not a profit association; membership may be an incident of the member's business, but is not a business in itself. "The New York Stock Exchange transacts no business as such in the buying and selling of stocks. * * * The business therein transacted is that of the individual members" (*People, ex rel. Lemmon* v. *Feitner*, 167 N. Y. 1, 5; 60 N. E. 265, *supra.*) Ownership of the Exchange building is certainly not a business of the members, since that is vested in a domestic corporation, taxable and taxed as such.

Thirdly, it is urged that the activities of the appellant's firm in dealing with or having its orders executed by its New York correspondents constituted a business in New York. This cannot be so both because the respondents themselves make no effort to tax the appellant for the profit resulting from those activities and also because of this Court's decision in *Bank of America* v. *Whitney Bank*, 261 U. S. 171, *supra*, where very similar transactions were held not to constitute business for the purposes of service of process. If the activities are not business for service of

process or taxation, clearly they are not business sufficient to make valid an extraterritorial tax on an intangible by giving it a "business situs."

It follows that the question raised on this appeal is a Federal one of substance inaccurately decided by the courts of New York and of which this Court has jurisdiction by virtue of Sec. 237 (a) of the Judicial Code as amended.

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June 16th, 1936.

(8019-C)